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**IN THE
COURT OF APPEALS OF INDIANA**

DANIEL BERNAUER,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A05-0512-CR-689
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Scott DeVries, Master Commissioner
Cause No. 49F09-0508-FD-136139

February 26, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Daniel Bernauer (“Bernauer”) was convicted in Marion Superior Court of Class D felony criminal recklessness¹ with a deadly weapon and sentenced to 910 days. Bernauer appeals, raising the issue of whether the State presented sufficient evidence to negate his claim of self-defense.

We affirm.

Facts and Procedural History

On October 8, 2005, Jennifer and Jesus Meija were driving westbound on 30th Street in Indianapolis when they were rear-ended by Bernauer. Jesus left his car to inspect the damage while Jennifer called the police on her cell phone. Bernauer also left his car to inspect the damage to the Meijas’ vehicle. Jesus told Bernauer that they needed to call the police. Bernauer told Jesus that he was driving his parents’ car and that they had insurance. Tr. p. 18. Then, Bernauer said, “F – I’m not goin’ to jail,” and walked back to his car. Id. at 19.

Jesus, concerned that Bernauer intended to flee the scene of the accident, followed Bernauer. Bernauer got in the driver’s seat of his car and tried to start the car. Jesus then ran over to the passenger’s side, reached into the car through the window and pulled the keys away from Bernauer. At this time, he noticed several empty beer cans littering the floorboard on the passenger side. Jesus then took the keys to the side of the street and told Bernauer, “You’re not going anywhere, we’re waiting for the police.” Id. at 22.

Bernauer then exited his car. He got very upset and yelled at Jesus, “give me the f– ing key.” Id. While he was yelling at Jesus, Bernauer began swinging at him. Jesus began backing away while telling Bernauer, “relax, we need to wait for the police.” Id. at

¹ Ind. Code § 35-42-2-2 (2004 & Supp. 2006).

23. At one point, Bernauer reached into his back pocket and then hit Jesus on the left side. Jennifer was watching the altercation from the side of their car. She saw a black thing go flying into the air and then saw blood all over the left side of Jesus's shirt. Jennifer picked up the object, which turned out to be a tire-rimming tool with a long, sharp pick on the end.

Jesus then tackled Bernauer and tried to restrain him. Bernauer tried to bite Jesus on the wrist of the hand in which he was holding the keys to Bernauer's car. At this time, Jesus also realized that there was quite a lot of blood on the left side of his shirt where Bernauer had struck him. Jennifer came over to where Jesus was sitting on Bernauer and began yelling at him and showing him the weapon she had picked up. One witness later stated that Jennifer kicked Bernauer in the head.

When the police arrived on the scene, they found Jesus restraining Bernauer, who was still screaming, on the ground. Indianapolis Police Officer Emily Perkins ("Officer Perkins") said she believed that Bernauer was drunk, as he smelled of alcohol. Id. at 92. Jennifer gave the tire tool to the police. Once the police had restrained Bernauer, Jesus lifted his shirt to look at his injury and discovered a puncture wound on his left side. Jesus was then taken to the hospital in an ambulance.

On August 11, 2005, the State charged Bernauer with Class D felony criminal recklessness. Bernauer waived his right to a jury trial and filed a Notice of Self-Defense on October 3, 2005. The trial court conducted a bifurcated bench trial on October 12, 2005, and November 16, 2005, and subsequently found Bernauer guilty. The trial court enhanced Bernauer's sentence based upon his criminal history and sentenced him to 910

days to be served consecutive to an outstanding sentence in Hamilton County. The trial court also entered a civil judgment against Bernauer in the amount of \$2,949.52 to cover Jesus's hospital bills. Bernauer now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Bernauer challenges the sufficiency of the evidence, contending the State failed to rebut his claim of self-defense. Specifically, Bernauer claims that the testimony indicated that Jesus was the initial aggressor and attempted to car jack Bernauer's vehicle, and that Bernauer used the minimal amount of force necessary to protect himself.

A valid claim of defense of oneself or another person is legal justification for an otherwise criminal act. Ind. Code § 35-41-3-2(a); Wallace v. State, 725 N.E.2d 837, 840 (Ind. 2000). In order to prevail on such a claim, the defendant must show that he: (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. McEwen v. State, 695 N.E.2d 79, 90 (Ind. 1998). When a claim of self-defense is raised and finds support in the evidence, the State has the burden of negating at least one of the necessary elements. Id. If a defendant is convicted despite his claim of self-defense, this Court will reverse only if no reasonable person could say that self-defense was negated by the State beyond a reasonable doubt. Taylor v. State, 710 N.E.2d 921, 924 (Ind. 1999). . . . The standard of review for a challenge to the sufficiency of evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim. Sanders v. State, 704 N.E.2d 119, 123 (Ind. 1999). We neither reweigh the evidence nor judge the credibility of witnesses. Id. If there is sufficient evidence of probative value to support the conclusion of the trier of fact, then the verdict will not be disturbed. Id.

Wilson v. State, 770 N.E.2d 799, 800-801 (Ind. 2002).

From his brief, it appears that Bernauer concedes that he stabbed Jesus with the tire tool. He insists, however, that he did so in self-defense. According to Bernauer, he was justified to be in the public street, Jesus was the initial aggressor, and Bernauer was

justified in using force, including deadly force, to stop the apparent car jacking of his vehicle. Br. of Appellant at 6.

After reviewing the transcript of the trial, we conclude that Bernauer's claim must fail. The record is clear that at no time did Bernauer withdraw from the encounter. A mutual combatant, whether or not the initial aggressor, must declare an armistice before he or she may claim self-defense. Wooley v. State, 716 N.E.2d 919, 926 (Ind. 1999); see Ind. Code § 35-41-3-2(e)(3) (2004 & Supp. 2006). Bernauer testified that Jesus was walking away from him with the keys in his hand, but then claimed he felt he needed to defend himself. Bernauer never alleged that he had declared an armistice with Jesus, which is a precondition for a claim of self-defense.

Furthermore, Witness Jason Larison ("Larison") testified that he saw Bernauer chasing Jesus and that Jesus was backing away from him. Tr. pp. 73, 76. Larison testified that at one point he saw a little black tool with a point in Bernauer's hand. Id. at 82. Larison also said that he did not see any blood on Jesus until after Jesus had restrained Bernauer on the ground. Id. at 77.

Jennifer likewise testified that she saw Jesus backing away from Bernauer while telling him to calm down. Jennifer said she saw Bernauer swinging at Jesus and at one point she saw a black tool in his hand, which she later retrieved from the ground. Jesus's story was compatible with that of Larison and Jennifer. He testified that he had taken Bernauer's car keys to prevent him from fleeing the scene and then Bernauer got out of the car and began screaming and swinging at him. Even Bernauer testified that Jesus was backing away from him with the keys to the car in hand. Id. at 94.

On the whole, this testimony does not support Bernauer's assertion that Jesus was the initial aggressor. Certainly, it does not indicate that Bernauer was justified in fearing for his life, as Jesus was backing away from him. Rather, the reasonable inference from this testimony is that Bernauer was angry that Jesus had prevented him from fleeing the scene and initiated an attack on him with the tire tool. Moreover, we can find no testimony supporting Bernauer's claim that Jesus was attempting to car jack him. Bernauer's argument amounts to a request for us to reweigh the evidence and the credibility of the witnesses, which we may not do. The State presented more than sufficient evidence to negate the claim of self-defense beyond a reasonable doubt.

Conclusion

We conclude that the State presented sufficient evidence to negate Bernauer's claim of self-defense.

Affirmed.

KIRSCH, C. J., and SHARPNACK, J., concur.